

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA                     )  
  )  
  )       CRIMINAL ACTION  
  )  
  )       No. 02-426  
MARK WATSON                                     )

**Padova, J.**

**MEMORANDUM**

**November \_\_, 2003**

Defendant Mark Watson has filed a Motion for New Trial, pursuant to Federal Rule of Criminal Procedure 33, and a Motion for Judgment of Acquittal, pursuant to Federal Rule of Criminal Procedure 29. For the reasons that follow, both motions are denied in their entirety.

**I. BACKGROUND**

On September 10, 2003, following a three day jury trial, Defendant Mark Watson was found guilty of one count of attempted possession with intent to distribute a controlled substance, in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(B). At trial, the Government presented evidence which could show that Mr. Watson received a Eureka vacuum cleaner box containing cocaine (the "package") by express mail on June 20, 2002. The package had been mailed from a Post Office in Los Angeles on June 18, 2002, and was addressed to Mr. Watson's half sister, Ms. Mimie Bethay, at 1206 Wycombe Avenue, Darby, Pennsylvania. Unbeknownst to Mr. Watson or Ms. Bethay, Federal agents had opened the package pursuant to a search warrant on June 19, 2002, replaced most of the cocaine with

a sham substance, and placed a transmitter in the package which would alert agents when Mr. Watson opened the package. Upon receiving the package, Ms. Bethay drove the package to a business known as Strictly Beauty Supply, where she met Mr. Watson. At Mr. Watson's request, Ms. Bethay left the package in the trunk of her car when she entered Strictly Beauty Supply. Mr. Watson then asked Ms. Bethay if he could borrow her car, and proceeded to drive the car to his home at 1451 Rainer Road, Brookhaven, Pennsylvania. Mr. Watson then carried the package into his home and opened it. When the transmitter alerted officers that the package had been opened, they entered Mr. Watson's house. The officers found that the package had been opened and that the sham substance had been removed. The officers later found the sham substance hidden in a crawl space above Mr. Watson's bedroom closet on the second floor of his house.

## II. MOTION FOR NEW TRIAL

"On a defendant's motion, the court may grant a new trial to that defendant if the interests of justice so require." Fed. R. Crim. P. 33. A motion for a new trial is "addressed to the trial judge's discretion." Gov't of Virgin Islands v. Lima, 774 F.2d 1245, 1250 (3d Cir. 1985). A new trial should be granted sparingly and only to remedy a miscarriage of justice. United States v. Copple, 24 F.3d 535, 547 n.17 (3d Cir. 1994). Furthermore, Rule 33 states that:

Any motion for a new trial grounded on newly discovered evidence must be filed within 3 years after the verdict or finding of guilty.

...

A motion for a new trial grounded on any reason other than newly discovered evidence must be filed within 7 days after the verdict or finding of guilty, or within such further time as the court sets during the 7-day period.

Fed R. Crim P. 33. Both The United States Court of Appeals for the Third Circuit ("Third Circuit") and the United States Supreme Court have held that the seven-day time limit is jurisdictional. United States v. Coleman, 811 F.2d 804, 807 (3d Cir. 1987); Carlysle v. United States, 517 U.S. 416 (1996). Therefore, "A district court is powerless to entertain such motions out of time unless the court grants an appropriate extension within seven days after the verdict." Coleman, 811 F.2d at 807 (citations omitted). A court cannot entertain a Rule 33 Motion based upon grounds other than newly discovered evidence even in cases where the court itself grants the defendant an extension of time to file after the seven-day period has expired. See United States v. Hall, 214 F.3d 175 (D.C. Cir. 2000) (district court did not have jurisdiction to hear defendant's Rule 33 Motion, where the defendant had requested an extension of time to file within the seven-day time period but court had failed to grant such extension until nearly a month after the jury verdict.)

Mr. Watson's Motion for New Trial is dated September 18, 2003, which is eight days after the date of the jury verdict in this case

(September 10th).<sup>1</sup> Mr. Watson was not granted an extension of time to file during the seven-day period following the verdict. Thus, this Court cannot entertain Mr. Watson's Motion for New Trial unless it is based upon newly discovered evidence.

A. Improper Statements Made by Prosecutor in Closing Statement

Mr. Watson argues that, during the prosecutor's closing statement to the jury, the prosecutor inappropriately identified Mr. Watson as the person seen in a surveillance videotape mailing a vacuum cleaner box from a Los Angeles post office. This claim is obviously not based upon newly discovered evidence, and the Court therefore cannot entertain it. Furthermore, even assuming, arguendo, that the Court could entertain this claim, the Court would exercise its discretion to deny it.

Mr. Watson asserts that, during closing argument, the prosecutor informed the jury that, "and I quote, 'Mark Watson is the perosn [sic] in the video, and Mark Watson mailed the package.' See Trial Transcript." (See Mot. for New Trial at 2.) Despite Mr. Watson's allegation that this statement is a direct quote from the trial transcript, this exact statement appears nowhere in the transcript of the prosecutor's closing statement. However, at one point during his closing statement the prosecutor did refer to Mr.

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<sup>1</sup> September 18, 2003 is the date used by Mr. Watson on the signature page of his Motion, not the date on which the Court received the Motion. The Court received the Motion approximately ten days later, on or about September 29, 2003.

Watson as the man in the videotape. Specifically, the prosecutor stated as follows:

What else happened on June 18th? Because of technology, you were taken back to June 18th and you saw what happened in that Los Angeles post office. You saw the defendant mailing this box to his sister, Mimie Bethay in Philadelphia. And this is going back to you in the jury room, you have a right to inspect it if you want to.

For your ease of reference, we've made some still photographs, 31A, B, C, D and you can see the defendant here mailing that express parcel.

Now, if there were any doubt at that point as to who this person was mailing this back, you'd have to look no further than the defendant, himself. Because when he is arrested two days later, what does he have on his person? He has exhibit 13, which is the customer's receipt, this is the receipt that the postal clerk gave to the person, who mailed the parcel in Los Angeles on June 18th, it was found two days later in the defendant's pocket in Philadelphia. There is no question that this is the defendant - this defendant - mailed this parcel.

(N.T. 9/10/03 at 169-70.)

Because no objection was made to the prosecutor's closing statement at the time of trial, the prosecutor's comments are reviewed for the presence of plain error. "In order to be plain error, an error must not only be 'obvious,' it must also have 'affected the outcome of the District Court proceeding.'" United States v. Bethancourt, 65 F.3d 1074, 1079 (3d Cir. 1995)(citing United States v. Olano, 507 U.S. 775 (1993)); see also United States v. Pungitore, 910 F.2d 1084, 1126 (3d Cir. 1990) ("We may reverse only if we find error in the prosecutor's comments so serious as to 'undermine the fundamental fairness of the trial and contribute to the miscarriage of justice.'"(citation omitted)).

The prosecutor is entitled to considerable latitude in summation to argue the evidence and any reasonable inferences that can be drawn from that evidence. United States v. Werme, 939 F.2d 108, 117 (3d Cir. 1991)(quoting United States v. Scarfo, 685 F.2d 842, 849 (3d Cir. 1982)).

A prosecutor should refrain from making statements which could convey the impression that evidence not presented to the jury, but known to the prosecutor, supports the charges against the defendant. Walker, 155 F.3d at 184. Similarly, a prosecutor should refrain from giving his personal opinion to the jury as to the truth or falsity of relevant facts, as "the prosecutor's opinion carries with it the imprimatur of the Government and may induce the jury to trust the Government's judgement rather than its own view of the evidence." Id. (discussing prosecutor's duties to avoid vouching for the credibility of a witness).

In this case, the prosecutor stated twice that "you saw the defendant mailing the package." (9/10/03 Tr. at 170.) A short time later, the prosecutor stated that "there is no question that . . . this defendant mailed this parcel." (Id.) Given the context in which they were made, the comments clearly did not convey to the jury that the prosecutor was aware of facts unknown to them which helped to establish Mr. Watson's guilt. To the contrary, the prosecutor made these statements while discussing and summarizing the evidence presented in the case relating to the identity of the

person who mailed the package.

Similarly, when read in context, it is clear that the prosecutor's statement to the effect that "there is no question that . . . this defendant - mailed this parcel," was not an expression of the prosecutor's personal opinion as to Mr. Watson's guilt or innocence, and would not have caused reasonable jurors to believe that the prosecutor knew something that he was not telling them. Rather, this statement was merely an invitation to the jurors to consider the substantial quantity of evidence presented and draw a rational inference that Mr. Watson was indeed the person who mailed the parcel in question from Los Angeles.

Even assuming, arguendo, that the prosecutor's comments were improper, Mr. Watson has utterly failed to establish that this error affected the outcome of his trial. This Court informed the jury in its preliminary instructions that the opening and closing statements of the prosecutor and defense attorney were not evidence. (9/8/03 N.T. at 48.) The Court further informed the jury during the final jury instructions that it was to follow its own recollection of the evidence in reaching a verdict, and not the recollections of the attorneys or the Court. (9/10/03 N.T. at 8.) Finally, at the request of Mr. Watson, the Court informed the jury that the identity of the person who committed the crime was disputed, and that to convict Mr. Watson they would need to determine "whether or not the person whose conduct was displayed to

you and was testified to, was this defendant, Mark Watson." (9/10/03 N.T. at 39.)

Furthermore, the jury at Mr. Watson's trial was presented with a substantial amount of evidence concerning the identity of the person who mailed the vacuum cleaner parcel from Los Angeles. In addition to presenting the surveillance camera videotape, the Government presented the mailing receipt given to the mailer of the vacuum cleaner package at the Los Angeles post office, which, according to the testimony of Police Officer Kennedy, was found in Mr. Watson's pocket when he was arrested. (See 9/9/03 N.T. at 75 & Ex. G-13.) Additionally, the government presented a plane ticket from Los Angeles to Philadelphia bearing the date of June 18, 2002, in the name of one of Mr. Watson's aliases, which was found in Mr. Watson's house at the time of his arrest. (See 9/9/03 N.T. at 91-92 & Ex. G-16.) Given the quantity and quality of evidence presented at Mr. Watson's trial with respect to the identity of the mailer of the vacuum cleaner package, Mr. Watson does not come close to establishing that the prosecutor's comments affected the outcome of his trial.<sup>2</sup>

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<sup>2</sup> Indeed, the actions of the jury during its deliberations clearly indicate that their determination of Mr. Watson's guilt was based upon the evidence presented at trial, and not the prosecutor's opinion as to Mr. Watson's guilt. During deliberations, the jury asked the Court to replay the post office surveillance videotape, as well as to play the tape of the testimony of Mimie Bethay. Ms. Bethay, who worked with Mr. Watson at a business known as Strictly Beauty Supply, testified that Mr. Watson had stopped coming to work about three to five days



B. Improper Conduct of the Court In Refusing to Allow Mr. Watson to Testify

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Mr. Watson contends that the Court acted improperly in refusing to allow him to testify at trial at the time of his choosing, thereby violating his Constitutional rights. This claim is obviously not based upon newly discovered evidence, and the Court therefore cannot entertain it. Furthermore, even assuming, arguendo, that the Court could entertain this claim, the Court would exercise its discretion to deny it.

During the trial, at the close of the Government's case, the Court recessed to give Mr. Watson and his attorney an opportunity to determine whether Mr. Watson wished to testify, or whether he wished to present any other evidence on his behalf. When the Court reconvened, Mr. Watson's attorney indicated that the defense intended to rest its case without presenting any further evidence. (9/9/03 N.T. at 164.) The Court then asked Mr. Watson whether he understood that he had a right to testify and whether he had discussed this right to testify with his attorney. (9/9/03 N.T. at 164-65.) Mr. Watson answered both questions in the affirmative. (Id.)

The Court then proceeded to hear closing arguments from both parties, and subsequently adjourned for the day. The next day, as

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preceding the delivery of the package, and had reappeared two days before the package was delivered and informed Ms. Bethay that she was going to be receiving a package for him. (See 9/8/03 N.T. at 66-67.)

the Court began its closing charge to the jury, Mr. Watson interrupted the proceedings and indicated that he had changed his mind and wished to testify on his own behalf. The Court denied Mr. Watson's Motion to Testify at that time.

Pursuant to Federal Rule of Evidence 611(a), a Court has discretion and may exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence, in order to, inter alia, "make the interrogation and presentation effective for the ascertainment of the truth." Fed. R. Evid. 611(a).<sup>3</sup>

In this case, granting Mr. Watson's request to testify after the final jury instructions had begun would have significantly delayed the trial, and would have likely resulted in juror confusion as well as prejudice to the defendant. Thus, the Court was well within its discretion when it denied Mr. Watson's inappropriate and untimely request to testify.

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<sup>3</sup> In United States v. Harley, 39 Fed. Appx. 789, 2002 WL 1558304 (3rd Cir. 2002)(Not Precedential), the Third Circuit, relying upon Fed. R. Evid. 611(a), upheld the refusal of the district court to allow the defendant to introduce evidence of a prosecution witness' prior conviction, where this evidence was presented in an untimely and inappropriate manner. The defendant in Harley had argued in that the crime which the defendant sought to use for impeachment purposes was a crimen falsi, and further that district courts do not have discretion to prevent a defendant from impeaching a witness with a crimen falsi. The Harley court rejected this argument, noting that the defendant had had ample opportunity to impeach the witness with this prior conviction during cross examination, but had failed to do so. The court therefore reasoned that "The District Court properly exercised its discretion to insure that the evidence was presented in an organized manner." Id. at \*1 (citing Fed. R. Evid. 611(a)).

C. Ineffective Assistance of Counsel

Mr. Watson asserts that his counsel was ineffective for failing to allow him to testify, as well as for failing to call two alibi witnesses which Mr. Watson asserts would have attested to his innocence.<sup>4</sup>

The Third Circuit has repeatedly indicated its preference that ineffective assistance of counsel claims be raised in a Petition for a Writ of Habeas Corpus pursuant to 28 U.S.C. § 2255, and not raised in motions for a new trial pursuant to Rule 33. See United States v. Gaydos, 108 F.3d 505, 508 n.5 (3d Cir. 1997). This is particularly true in cases, such as this one, where the Court can only consider those claims brought in a Rule 33 Motion which are based upon newly discovered evidence. United States v. Chorin, 322 F.3d 274, 282 n.4 (3d Cir. 2003); United States v. Derewal, 10 F.3d 100, 104 (3d Cir. 1993). This is because "Attempting to shoehorn such [ ] claim[s] into a Rule 33 newly discovered evidence motion is not an easy task." DeRewal, 10 F.3d at 104.

Entertaining Mr. Watson's ineffective assistance of counsel claims on a Rule 33 Motion would be particularly inappropriate given the fact that the allegations would require an evidentiary hearing, which could further delay Mr. Watson's sentencing. Furthermore, Mr. Watson has a clear remedy for his counsel's

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<sup>4</sup> Mr. Watson fails to identify either of these witnesses by name, or to indicate specifically what these witnesses would have testified to.

alleged inadequate assistance in the form of a petition filed pursuant to 28 U.S.C. § 2255. Thus, the Court in its discretion declines to entertain Mr. Watson's ineffective assistance of counsel claims at this time.

### III. MOTION FOR JUDGMENT OF ACQUITTAL

In addition to his Motion for New Trial, Mr. Watson has submitted a Motion for Judgment of Acquittal pursuant to Federal Rule of Criminal Procedure 29. Mr. Watson argues that the evidence presented at his trial was insufficient to support the jury's guilty verdict. Rule 29 provides that,

A defendant may move for a judgment of acquittal, or renew such a motion, within 7 days after a guilty verdict or after the court discharges the jury, whichever is later, or within any other time the court sets during the 7-day period.

Fed. R. Crim. P. 29(c)(1). The United States Supreme Court has held that this time limit is jurisdictional, and that a court cannot grant a Motion for Judgment of Acquittal filed after the seven-day period unless the court grants additional time during the seven-day period. Carlisle v. United States, 517 U.S. 416 (1996). Mr. Watson's Motion for Judgment of Acquittal is dated September 18, 2003, eight days after the date that the jury delivered its verdict and was discharged in this case (September 10th).<sup>5</sup> Mr.

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<sup>5</sup> September 18, 2003 is the date used by Mr. Watson on the signature page of his motion, not the date on which the Court received the Motion. The Court received the Motion approximately ten days later, on or about September 29, 2003.

Watson was not granted an extension of time to file during the seven-day period following the verdict. Thus, this Court cannot entertain Mr. Watson's Motion for Judgment of Acquittal.

Even assuming, arguendo, that the Court could entertain Mr. Watson's Motion for Judgment of Acquittal, it would still deny it, as this motion is entirely without merit. "A claim of insufficiency of evidence places a very heavy burden on the appellant." United States v. Coyle, 63 F.3d 1239, 1243 (3d Cir. 1995.) This Court must "view the evidence in the light most favorable to the government and must sustain a jury's verdict if 'a reasonable jury believing the government's evidence could find beyond a reasonable doubt that the government proved all the elements of the offenses.'" United States v. Rosario, 118 F.3d 160, 163 (3d Cir. 1997)(quoting United States v. Salmon, 944 F.2d 1106, 1113 (3d Cir. 1991)).

Mr. Watson asserts that "there is absolutely no evidence in the record from which the court could find that defendant Mark Watson was the mailer of this package." (Mot. for Acquittal, at 2.) As discussed, supra, there was a substantial amount of evidence introduced regarding the identity of the mailer of the package. This evidence included surveillance video of the person mailing the package at a Los Angeles post office, as well as evidence which placed Mr. Watson in Los Angeles at the time when the package was mailed. (See supra at p. 8.) Furthermore, testimony was introduced

at trial that the sham substance that was present in the package when it was delivered to Ms. Bethay was found hidden in a closet in Mr. Watson's bedroom when police searched his house. (9/9/03 N.T. at 85-87.) Mr. Watson's attempt to hide the substance from police officers as they entered his house is not consistent with his assertion that he did not mail the package and was unaware that the package contained an illegal substance. Thus, Mr. Watson's Motion for Judgment of Acquittal is denied in its entirety.

#### IV. CONCLUSION

For the foregoing reasons, Defendant Mark Watson's Motion for New Trial and Motion for Judgment of Acquittal are both denied in their entirety. An appropriate order follows.

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	)	
	)	CRIMINAL ACTION
v.	)	
	)	No. 02-426
MARK WATSON	)	

**ORDER**

**AND NOW**, this 14th day of November, 2003, upon consideration of Defendant Mark Watson's Motion for Judgment of Acquittal or For New Trial (Docket # 99), Defendant Mark Watson's Motion for New Trial (Docket # 100), and all related submissions, for the reasons stated in the accompanying memorandum, **IT IS HEREBY ORDERED** that both motions are **DENIED** in their entirety.

BY THE COURT:

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John R. Padova, J.